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SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. 72-5064

MATTHEW O. REILLY,
Petitioner,

CAULDWELL-WINGATE COMPANY, INC., BERNARD J. ROSEN, MAX STAHL and STANLEY STAHL,
Respondents.

Pet Supplemental Reply BRIEF

PETITIONER'S SUPPLEMENTAL PETITION AND REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MATTHEW O. REILLY,

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vs.

CAULDWELL-WINGATE COMPANY, INC., BERNARD J. ROSEN and MAX STAHL,

Respondents.

PETITIONER'S REPLY AND SUPPLEMENTAL PETITION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner respectfully supplements the petition herein and replies to respondents' brief in opposition.

ADDITIONAL QUESTIONS PRESENTED

A. Are the CFR Sections controlling contingent fees applicable where Government contracting agency (FHA) is only in the position of a mortgage in possession (by assignment of the mortgage) at the time of contracting and did not acquire title until after completion of the subject contract?

B. Can the CFR provisions be used, or were they intended, to protect, by indirection, a private owner with property involving an FHA mortgage thereon?

ADDITIONAL STATEMENT

The subject-matter of the action herein is work labor and services performed by the petitioner in furtherance of a joint-venture agreement with the defendants-respondents; which, involved construction contracts affecting private properties owned by the Taylor International Corporation and their limited partners Frank & Norman Sidenwurm and a wholly owned subsidiary Gregory Park Inc., of Delaware. These companies were owners of the properties until the FHA took possession thereof by foreclosure proceedings culminating in judgments as follows:

1. Gregory Park No. 1, Inc., Oct. 19, 1966; wherein a judgment was secured amounting to $1,781,933.14.

2. 555 Mt. Prospect Ave., Newark, March 27, 1968; wherein a judgment was secured amounting to $3,341,784.53.

3. 515 Mt. Prospect Ave., Newark, Oct. 28, 1970; wherein a judgment was secured amounting to $562,253.05.

The total judgements secured by the United States government amounted to $5,685,970.72; and, although the private owners, as aforesaid, of the properties affected were in default of their mortgage obligations Oct. 1, 1962 and were in re-organization between 1963 and 1965, they were permitted to milk the corporate assets and make further arrangements with the defendant-respondents herein to secure windfall profits as alleged in the complaint.

It is an established fact, as demonstrated by affidavits herein included in the record that the windfall profits amounted to a total of $3,349,995.00; which, as alleged, was secured by the defendant-respondents and their co-conspirators who were unjustly enriched at the expense of the plaintiff-petitioner.

At the time that the private owners, as aforesaid, were in default on the mortgages in question, concerning completion of the construction contracts with the sub-contractors, there was a balance due and owing amounting to $2,278,281.00. However, the private owners in league with the defendant-respondents, with the acquiescence of the FHA arranged contracts for the completion of the project for $5,628,276.00.

Additionally, the FHA deferred the foreclosure proceedings, quite cleverly, in order that this windfall might be realized by the defendant-respondents herein; and, too, in order that the private owners, the Taylor International Corporation and their aforesaid partners could continue reaping the harvest of funds under their control.

The fact that the FHA did not acquire title to the premises in question until the foreclosure proceedings, as aforementioned, is significant in that petitioner was not aware of it until after the commencement of these proceedings; and, furthermore, the private ownership of the said premises places in question the position of the defendant-respondents respecting the construction contracts involved in the claims herein.

The joint venture agreement between the petitioner and the respondents was for new construction business affecting private interests and properties; and, had no relationship to the United States government.

According to the agreement as alleged in the complaint the parties were to share in profits in accord with a schedule of percentages of the total amounts involved in contracts for new construction work.

The issues surrounding these claims have never been litigated or resolved on the merits.

POINT I

CFR CONTROL OF CONTINGENT FEES IS FOR PROTECTION OF GOVERNMENT, NOT PRIVATE ENTREPRENEURS DEFAULTING ON MORTGAGES WHICH INURE TO GOVERNMENT AFTER THE EVENT.

The elements set forth hereinabove, newly discovered by petitioner and not raised below, or in the petition, are offered under the authority of *Duigan v. U.S.*, 274 U.S. 195, 200.

It is respectfully submitted that the new questions raised herein raise a question of great public interest meriting this Court's resolution, particularly in view of the large number of FHA mortgages extant, an unascertainable number of which may, by mortgage defaults, result in assignment to the FHA, as herein.

It is further respectfully submitted that the purpose of the CFR control over contingent fees is not to protect private ownership, directly or indirectly, from contingent fees.

To apply the CFR restriction (ignoring, for the mement, the exemptions therefrom) to the contract at bar is to apply the "protection" thereof to private ownership, as, for example, the

property could have remained in private ownership (without the FHA's eventual acquisition of title), in which event private entrepreneurs would have borne the cost of the contingent fee through re-imbursement to the FHA.

So applied, the CER is an unconstitutional abridgement of the right to contract.

POINT II

THE INTER-CIRCUIT CONFLICT WITH THE AFFIRMANCE HEREIN BY THE SECOND CIRCUIT COURT OF APPEALS WAS BROUGHT INTO CLEAR FOCUS BY THE RECENT DECISION BY THE THIRD CIRCUIT IN *SMITH, ET AL V. PITTSBURGE GAGE AND SUPPLY COMPANY, —— F.2d —— (NO. 71-1390, FILED JULY 17, 1972).*

The decision below conflicts with the recent Third Circuit decision in *Smith et al v. Pittsburgh Gage And Supply Co.*, —— F.2d —— (No. 71-1390, Filed July 17, 1972), which conflict warrants this court's resolution of the important practice question of the "inflexibility" of the res judicata doctrine when it is applied to deny justice.

In *Smith*, the Third Circuit wrote, per Rosenn, C.J. (p. 6 of slip opinion):

> "However, jurisdictional dismissals do not bar further litigation of the cause of action when the subsequent complaint cures the jurisdictional defect."

and at p. 7:

> "In determining the existence of a disputed issue of material fact on motion for summary judgment, a district court should resolve all inferences, doubts and issues of

credibility against the moving party. *** Despite the liberalization of F.R. Civ. P. 56 in 1963 to permit increased freedom to trial courts to grant summary judgments, it is improper to deprive a party of a full hearing on the merits unless it is clear on the undisputed facts before the court that no material issue of fact has still to be resolved.

* * *

While the doctrine of res judicata is meant to foster judicial efficiency and protect defendants from oppression of repeated litigation, it should not be applied inflexibly to deny justice."

In the case at bar, petitioner has not had a trial on the merits on his claim, although Judge Weinfeld, in the first action, held, on respondents' motion for summary judgment relying on the CFR bar, that issue should be determined only after a full trial.

Petitioner, therefore, has been denied justice by the grant of summary judgment in the second action, over-riding Judge Weinfeld's decision and order, and has been denied the trial of his claims that justice and Judge Weinfeld's order required.

POINT III

RESPONDENTS' RELIANCE ON *WOLT v. GLAZER*, 17 MISC. 2d 522, 523 IS MISPLACED.

In their brief, Point II, at p. 5, respondents mistakenly rely on *Wolf v. Glazer*, 17 Misc. 2d 522, 523, Appellate Term (1959) without identifying the court or noting the date thereof, in an effort to over-come the impact of the appellate decisions cited by petitioner in Point II of the petition, at p. 15, holding that a

cause of action for actual fraud (as herein) does not accrue until discovery thereof (*Altman v. Finkel* (1st A.D. 1945), 52 N.Y. Supp. 2d 634, 638; *Hearn 45th Corp. v. Jano* (1940), 283 N.Y. 139, 141, 27 N.E. 2d 814, 815; *Nasaba Corp. v. Harfred Realty Corp.* (1942), 287 N.Y. 290, 39 N.E. 2d 243.)

Despite what respondents rely on in *Wolf*, the higher and highest, New York courts clearly hold that petitioner's time runs from discovery of the fraud in 1968, the statute of limitations therefore running till 1974, and see CPLR 213, subpar. 9, providing that time, in an action based on actual fraud, runs from time of discovery (added L. 1965, C. 248), thereby codifying the case law cited.

POINT IV

RESPONDENTS FAIL TO ANSWER PETITIONER'S RES JUDICATA POINT, IN POINT III OF PETITION, THEREBY ADMITTING VALIDITY THEREOF.

Respondents have not answered petitioner's res judicata argument, raised in Point III, Petition (pp. 15-16), and have thereby tacitly admitted the validity of petitioner's argument thereon.

In the face of that tacit admission, petitioner relies on the discussion thereof in the petition (pp. 15-16).

CONCLUSION

For the reasons set forth herein and in the petition, petitioner respectfully prays this Court to grant its Writ of Certiorari to the Court of Appeals For the Second Circuit to review the judgment thereof.

Respectfully submitted,

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